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TAY YEW CHONG v. KOH HOOI SIANG & ORS

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
NOR BEE ARIFFIN JCA
HAS ZANAH MEHAT JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-2035-10-2018]
15 OCTOBER 2020

CONTRACT: *Construction – Legal principles of construing contract – Sale and purchase agreement – Parties entered into sale and purchase agreement ('SPA') for*
C *sale of property and executed supplemental agreement and personal guarantee – Whether agreements contemporaneously executed and formed single transaction – Whether to be read together – Meaning, purport, aim and object of agreements – Whether agreements entered into involved loan transaction or sale and purchase of property*

D ***CONTRACT:*** *Agreement – Breach – Parties entered into sale and purchase agreement for sale of property and executed supplemental agreement and personal guarantee – Lender/purchaser to give loan to vendor/borrower under agreements and not purchase nor transfer ownership of property – Borrower to repay loan sum within stipulated time – Allegation that purchaser failed to make full payment of*
E *purchase price and unlawfully transferred property to own name before expiry of repayment period – Whether agreements entered into involved loan transaction or sale and purchase of property – Whether agreements enforceable and valid – Whether transfer of property to lender/purchaser valid – Whether there was breach of terms of agreements*

F One Mr Low ('deceased'), who was in a financial distress, approached his brother in law, the appellant ('defendant') for a loan of RM600,000. The two then entered into a sale and purchase agreement ('SPA') for the sale of the deceased's property at the purchase price of RM1.6 million ('purchase price'). This was followed by the execution of a supplemental agreement
G ('SA'), which the deceased's wife, the third respondent ('third plaintiff'), was a party to, and a personal guarantee ('PG'). At the material time, the property was charged to the bank and there was a caveat lodged on it by third parties. Pursuant to the SPA, the SA and the PG ('three agreements'), (i) the defendant was to give a loan to the deceased and not to purchase the property;
H and (ii) the deceased and the third plaintiff had to repay the loan sum of RM1.6 million ('loan sum') within a year and the defendant would not transfer the ownership of the property. However, according to the plaintiffs, (i) the defendant failed to make full payment of the purchase price within the time stipulated in the SPA. The defendant paid RM1,552,847.01 to third
I parties and the balance was paid out of time; (ii) the defendant unlawfully transferred the property into his name before the expiry of the one-year

period and before the payment of the full sum of the purchase price. As the deceased was not accorded due consideration to repay the loan, the transfer was improper, premature, null and void; and (iii) since the three agreements involved a loan transaction, not a sale and purchase of the property, they were unenforceable, invalid and illegal, rendering the transfer of the property to the defendant null and void. Premised on the above-mentioned grounds, the plaintiffs commenced a claim against the defendant at the High Court. Objecting to the plaintiffs' claim, the defendant argued that (i) the SPA was for the sale and purchase of the property and not merely a security for the loan; (ii) the purchase price was an estimation of the amount of debts owed by the deceased to third party creditors and the bank. The amount was to be paid directly by the defendant to the deceased's creditors and other expenses. The total amount of debts owed by the deceased to the third party creditors and the bank was RM1,552,847.01 and this was the real amount and intended consideration for the property; (iii) the defendant made payments of the purchase price to the creditors of the deceased totaling to RM1,552,847.01 and the deceased and the third plaintiff were aware of these payments; (iv) the transfer of the property to the defendant was made pursuant to the SPA. The deceased had signed the memorandum of transfer ('MOT') and, therefore, the transfer was validly executed; and (v) pursuant to the SPA, the property would be transferred/sold back to the deceased if the purchase price was repaid in full within one year from the date of the SPA. Since the deceased or the plaintiffs failed to make payment to the defendant within the repayment period, the defendant was entitled to exercise his rights under the SPA to either keep or sell the property to recover the purchase price. The defendant counterclaimed for (i) specific performance of the SPA *ie* for the plaintiffs to surrender vacant possession of the property to the defendant and upon the surrender of the vacant possession, the defendant be permitted to exercise his rights under cls. 2A.6-2A.8; (ii) damages *in lieu* of specific performance or be permitted to summarily terminate the SPA where the plaintiffs would have to refund all the monies paid by the defendant towards the property together with agreed liquidated damages; and (iii) alternatively, if the SPA was found to have been determined automatically, for the plaintiffs to make a refund of RM1,552,847.01 to the defendant. Allowing the plaintiffs' claim and dismissing the defendant's counterclaim, the Judicial Commissioner ('JC') opined that (i) the SPA was determined automatically as the defendant failed to pay the full payment of purchase price as *per* the SPA; (ii) the transfer of the property to the defendant was null and void and the defendant was ordered to re-transfer the property to the plaintiffs; and (iii) the three agreements were illegal and invalid. Hence, the present appeal by the defendant.

Held (allowing appeal)
Per Nor Bee Ariffin JCA delivering the judgment of the court:

(1) The sole function of the court, in construing a document, is with a view to finding the intention of the parties. The approach the court should adopt when asked to determine the true nature of the bargain between contracting parties is an objective approach. The whole contract has to be considered with reference to its object and the whole of its terms. The court cannot rewrite the contract for the parties by imposing a term which could not be imported into the contract or go behind the written terms of the contract to introduce or add new terms to it. In cases where several contracts are contemporaneously executed, the general rule is that reference should be made to all the deeds to ascertain the intention of the parties. (paras 31-35)

(2) This case turned on the construction of the three agreements. Not only was the JC's approach to construction of the contract documents inconsistent with established principles, the JC also erred in failing to appreciate the surrounding circumstances relating to the making of the SPA and, in particular, the SA and the PG. The JC approached the issues based solely on the SPA; the SA and the PG did not come under his scrutiny. The three agreements were contemporaneously executed and were obviously connected to each other and formed a single transaction. Therefore, the three agreements had to be read as a whole to comprehend their meaning, purport as well as their aim and object. (paras 30, 36 & 39)

(3) When read together, the three agreements showed that the contracts were entered into because the deceased was in financial distress. He desperately needed a loan from the defendant to settle his debts with the third parties and the bank. Had the JC read the SPA along with the SA and the PG, disregarding the oral views of the witnesses on the interpretation of the SPA, His Lordship would have come to a finding that the SPA was an agreement governing the repayment of the loan to be extended by the defendant and to be secured by the property. The loan granted to the deceased was the purchase price for the property. (paras 40, 42 & 44)

(4) The SPA was a means by which the defendant ensured that his friendly loan to the deceased would be protected by security in the form of the property. The contractual obligations of the parties were quite spelt out. The defendant's contractual obligations, *inter alia*, and most importantly, was to pay the purchase price within the period stipulated in the SPA. The SPA and the SA made provisions that if the deceased and the third party were to pay back the purchase price or the loan sum within the repayment period, the defendant was contractually bound to

transfer or sell back the property to the deceased. Clauses 2A.1 to 2A.8 of the SPA were incorporated to safeguard the interests of the deceased. (paras 46-48)

(5) It was the true intention of the parties that the payments made pursuant to the SPA would constitute the purchase price. It made no difference if the payments defrayed eventually came up to RM1.6 million or only RM1,552,847.01. It would certainly make a huge difference if there was a provision in the SPA, or even in the SA and the PG, stating to the effect that any balance from the payments effected, if the amount was less than RM1.6 million, had to be paid back to the deceased. However, there was none. The plaintiffs were bound by the terms the deceased had agreed with the defendant that under the present circumstances, the purchase price was not RM1.6 million but RM1,552,847.01. It was the court's duty to preserve the sanctity of the contract freely entered into by the parties and to give effect to the bargain of the parties according to their intention. Nothing turned on the later payment of RM47,706.99. (para 60)

(6) The defendant paid off all the deceased's creditors, totalling to RM1,552,847.01. As the payments were effected within the timeline stipulated, there was no breach of the terms of the SPA by the defendant that could render the agreement automatically determined and there was nothing to forfeit. The forfeiture of the entire sum of RM1,552,847.01 was plainly erroneous. Since all the payments were fully effected and the deceased had signed the MOT, the defendant was permitted to transfer the property to his name. The defendant would only be in breach of his contractual obligations under the SPA and the SA if he had received the payment of RM1,552,847.01 within the repayment period and he refused to transfer or sell back the property to the deceased's estate. This was not the case here. Therefore, the transfer could not be premature, void, unlawful and against the provisions of the SPA. It was validly executed by the defendant in accordance with the provisions of both the SPA and the SA as agreed by the deceased and the third plaintiff. (paras 62, 63, 66 & 69)

(7) The High Court order was set aside. The plaintiffs' claim was dismissed while the defendant's counterclaim was allowed. The JC's decision had resulted in the plaintiffs being unjustly enriched at the expense of the defendant. It was unjust for the plaintiffs to be allowed to forfeit the entire RM1,552,847.01 and, at the same time, be permitted to retain the ownership of the property. In other words, the plaintiffs did not have to pay back the loan, had their debts to the third parties creditors including the bank paid off and owned the property that was no longer

encumbered. The JC's decision had caused gross injustice to the defendant who, at the end of the day, was left with no remedy whatsoever. He could not recover the RM1,552,847.01; he had lost the security to recover his money; and he was denied the right to enforce the PG against the third plaintiff by reason of the alternative claim that the plaintiffs had succeeded to obtain. (paras 72 & 73)

Case(s) referred to:

Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor [2014] 5 CLJ 265 CA ***(refd)***

Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 LNS 194 SC ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***

Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***

Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***

Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors [1982] 1 LNS 11 FC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

For the appellant - Ranjit Singh, Villie Nethi, Abd Halim & Louis Liaw Vern Xien; M/s Ramrais & Partners

For the respondents - Malathi Krishnan; M/s Mal Krishnan & Co

[Editor's note: For the High Court judgment, please see Koh Hooi Siang & Ors v. Tay Yew Chong [2018] 1 LNS 1391 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nor Bee Ariffin JCA:

Introduction

[1] The defendant entered into the sale and purchase agreement dated 24 November 2015 ("the SPA") with Low Yew Sun to purchase the latter's property, a residential land with a three-storey semi-detached house erected thereon ("the property"). Low Yew Sun who was the defendant's brother-in-law and the third plaintiff's husband, died on 13 September 2016. The defendant had pursuant to the SPA, transferred the property into his name. The plaintiffs claimed that the transfer was pre-matured, unlawful and null and void.

[2] There are two main disputes between the parties: (i) whether the SPA was for the purchase of the property or it was merely intended to serve as a security for a loan that was given to Low Yew Sun ("the deceased") by the defendant; and (ii) whether the defendant had breached the SPA. The plaintiffs claimed, *inter alia* for a declaration that the SPA was determined automatically by reason of the breaches committed by the defendant and for the re-transfer of the property to the estate of the deceased. The defendant filed a counterclaim, *inter alia* for specific performance of the SPA or alternatively a refund of the loan sum.

[3] The learned Judicial Commissioner ("JC") had on 21 September 2018, after a full trial, allowed the claim by the plaintiffs and dismissed the defendant's counterclaim. The defendant appealed against this order.

[4] After perusing the appeal records and giving much consideration to the submissions of both parties oral and written, we unanimously allowed this appeal. We set aside the order of the High Court. In this judgment, the appellant and the respondents will be referred to as they were in the proceedings before the High Court.

The Background

[5] The learned JC had set out both the pleaded case of the plaintiffs and the defendant at length. We adopt the facts as narrated by His Lordship JC with suitable modifications.

[6] The gist of the plaintiffs' pleaded case is summarised as follows. Before his demise, the deceased who was facing financial problems, approached the defendant for a loan of RM600,000 as a capital for his business and to settle his business debts.

[7] The property was at that material time charged to Alliance Islamic Bank Bhd ("the bank"). There was a caveat lodged over it by one Choo Yoong Kian. The plaintiffs claimed that the defendant insisted on settling the overdue debt to the bank for the housing loan of the property notwithstanding what the deceased and the third plaintiff wanted was only to obtain a loan of RM600,000. They could afford to pay the monthly instalments to the bank for the housing loan.

[8] However, at the defendant's insistence, the SPA was executed wherein the deceased agreed to sell and the defendant agreed to purchase the property at the price of RM1,600,000 ("the purchase price"). This was followed by the execution of the supplemental agreement and the personal guarantee the next day on 25 November 2015.

[9] The third plaintiff was a party in the supplemental agreement. Pursuant to the supplemental agreement, the deceased and the third plaintiff as the guarantor *inter alia*, undertook the repayment of the loan sum of RM1,600,000 within one year from the date of the SPA. The supplemental agreement was to form an integral part of the SPA.

[10] The personal guarantee was between the defendant and the third plaintiff. Pursuant to the personal guarantee, the third plaintiff had agreed *inter alia*, to guarantee the repayment of the purchase price and payment of all other monies and liabilities in respect of the loan sum of RM1,600,000 and under the SPA and the supplemental agreement.

[11] The intention of the parties in entering into the SPA, the supplemental agreement and the personal guarantee was for the defendant to give a loan to the deceased and not to purchase the property. The deceased and the third plaintiff were given a year to repay the loan and the defendant would not transfer the ownership of the property as the SPA was executed merely to secure the repayment of the loan to the defendant. It was a family transaction.

[12] However, the defendant did not keep his part of the bargain. He breached several terms of the SPA. The crux of the plaintiffs' complaint was essentially on three main grounds. First, the defendant had failed to make full payment of the purchase price of RM1,600,000 to the deceased within the time stipulated in the SPA. The purchase price was not RM1,552,847.01. Even if RM1,552,847.01 was paid out to third parties, the payment was without the consent of the deceased. The balance purchase price in the sum of RM47,706.99 was only paid by cheque dated 23 October 2017, which was out of time. The plaintiffs refused to accept the payment and the same was returned back to Messrs William Leong & Co on 24 October 2017. The late payment was an admission that the defendant had not made full payment for the purchase price pursuant to the SPA. The SPA was thus determined automatically pursuant to cl. 3.1.

[13] Second, the defendant unlawfully transferred the property into his name on 13 November 2016 before the expiry of the one year period which was 23 November 2016 and before the payment of the full sum of the purchase price which was 11 March 2016 (para. 8(iii) of the amended statement of claim ("amended SOC")). The deceased was not accorded due consideration to repay the loan during the repayment period. Thus the defendant had acted pre-maturely and had wilfully breached the terms of the SPA and the transfer was improper, pre-matured and null and void. The property must be re-transferred to the administrators of the estate of the deceased.

[14] Third, the plaintiffs also claimed that the SPA, the supplemental agreement and the personal guarantee involved a loan transaction and not a sale and purchase of the property. As such, all three agreements were unenforceable, invalid and illegal which rendered the transfer of the property to the defendant null and void.

[15] In the sale and purchase transaction, the defendant had the benefit of legal representation by a law firm Messrs William Leong & Co, while the deceased and the third plaintiff were not represented by solicitors. Messrs William Leong & Co had prepared all the contract documents. The plaintiffs claimed that the same only favoured the defendant's rights without considering the interests of the deceased and the third plaintiff.

[16] The following is a summary of the defendant's defences. The SPA was a sale and purchase of the property and not merely intended to serve as security for the loan given. The purchase price stipulated in cl. 1.1 of the SPA was merely an estimate of the amounts of debts owed by the deceased to third party creditors and the bank. The said amount was to be paid directly by the defendant to the deceased's creditors and other expenses for the purpose of the sale and purchase transaction. The total amount of debts owed by the deceased to the third party creditors and the bank was RM1,552,847.01. This amount was the real and intended consideration for the property.

[17] The deceased had *via* two emails dated 16 November 2015 and 21 November 2015 sent to the defendant's solicitors the list of his creditors and the outstanding loan amount owing to the bank. The list was set out in cl. 7.2 of the amended statement of defence ("amended SOD").

[18] Pursuant thereto, the defendant through his solicitors, made payments of the purchase price to the creditors of the deceased totalling RM1,552,847.01. The deceased and the third plaintiff were duly informed of the payments made.

[19] The transfer of the property to the defendant as the purchaser was made pursuant to cls. 2A.5 and 2A.6. The deceased had signed the memorandum of transfer on 25 February 2016. The defendant had duly paid RM42,000 for the stamp duty. The transfer was therefore validly executed. As the owner of the property, the defendant made payment for the quit rent and assessment rate for the year 2017.

[20] Pursuant to cl. 2A.5 of the SPA, the property would be transferred/sold back to the deceased if the purchase price was repaid in full within one year from the date of the SPA, ie, by 23 November 2016 (the repayment period). However, the deceased or the plaintiffs had failed to make payment to the defendant within the repayment period. The defendant was thus

A entitled to exercise his rights as stipulated under cl. 2A.6 of the SPA to either keep or sell the property to recover the purchase price. The defendant attempted to enforce his rights to sell the property but could not be proceeded with as the third plaintiff had filed the present suit.

B **[21]** In the counterclaim, the defendant claim for specific performance of the SPA, ie, for the plaintiffs to surrender vacant possession of the property to the defendant pursuant to cl. 10.1 and upon surrender of the vacant possession, the defendant be permitted to exercise his rights under cls. 2A.6 to 2A.8. The defendant also sought damages *in lieu* of specific performance or be permitted to invoke cl. 15(b) to summarily terminate the SPA whereby C the plaintiffs would have to refund all monies paid by the defendant towards the property together with agreed liquidated damages in the sum of RM160,000. Alternatively, if the SPA was found to have been determined automatically pursuant to cl. 3.1, for the plaintiffs to make a refund of RM1,552,847.01 to the defendant.

D **[22]** The late payment of RM47,706.99 was not an admission that the full sum was not effected. The RM1,552,847.01 was paid in accordance with the SPA whereby the defendant had paid off the creditors of the deceased and the expenses as envisaged by the SPA.

E **At The High Court**

[23] The parties each filed their respective issues to be tried. The learned JC having heard the evidence, identified the following issues for determination:

(i) The status of the conditional SPA;

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(ii) What was the purchase price that the defendant was to pay according to the SPA?

(iii) Has the defendant discharged his obligations under the SPA by paying to all the creditors as in cl. 2.2 as the purchase price and within the G knowledge of the deceased and the third plaintiff?

(iv) Should the property have been transferred to the defendant?

(v) Should the money paid by the defendant amounting to RM1,552,847.01 be forfeited by the plaintiff pursuant to cl. 3.1 of the SPA?

H **[24]** His Lordship dealt with each issue in turn. He however omitted to list out as an issue the plaintiffs' alternative claim on the subject of the illegality and unenforceability of the SPA by reason of it being in disguise of conditional SPA. The said issue was raised by the plaintiffs in their issues to be tried at para. 10. The decision of the learned JC when allowing the I same was assailed by the defendant in his ground of appeal in paras. 14 and 16.

[25] The learned JC made the following conclusion in paras. 21 and 22 of the judgment on the issues for determination, as reproduced below:

21. In conclusion to the above, it is my findings as below:

(a) The true intention of the Sale and Purchase Agreement between the Deceased/the Third Plaintiff and the Defendant was that though the Defendant had assisted in paying the Deceased's debts to various creditors under Clause 2.2 (2.1) to 2.2 (2.6), the property would only be hold as a security and nothing on the transfer of the property in view of the Deceased needs to repay back the Defendant's loan within a year. Nevertheless, in view of Clause 1.1, 6.1, 2A.6 and 2A.7, the option would be given to the Defendant to keep or sell the Property provided in the following:

(i) The Defendant (Purchaser) paid the Purchase Price amounting to RM1,600,000.00 within 90 days from the date of the Agreement (24 November 2016). This would means that the Defendant would pay 23 January 2016 (Completion Date) or the Extended Date on 23 February 2016; or

(ii) The Vendor (Deceased) to pay the Purchaser (Defendant) the full Purchase Price within one year from the date of the Agreement ie on 25 November 2016.

(b) The Purchase Price of the Property is clearly stated in Clause 1.1 of the Agreement being RM1,600,000.00 (RM1.6 million);

(c) There is nothing or any evidence to prove that the amount of RM1,552,847-01 was not paid by the Defendant through letters dated 18 December 2015, 14 March 2016, 6 May 2016, 27 June 2016, 23 August 2016 and 18 November 2016 (Bundle B, page 228, 242 to 248), all of which informed the Deceased and the Third Plaintiff of the amount of RM1,552,847.01 which was paid.

(d) The Defendant did not make full payment of RM1,600,000.00 (RM1.6 million) being the Purchase Price of the Property according to the Sale and Purchase Agreement on the completion date or the extended completion date.

(e) Such transfer was pre-mature, void and unlawful and against the provisions in the Sale and Purchase Agreement.

(f) Due to the breach of the terms of the contract, the agreement is automatically determined and the Plaintiff can exercise their rights pursuant to the same and forfeiting the payments made in Clause 1 of the Sale and Purchase Agreement.

[26] The learned JC entered judgment in favour of the plaintiffs and allowed the prayers sought by the plaintiffs in para. 26(1) to (15) in the amended SOC, including the alternative claim. The plaintiff was awarded costs of RM120,000.

[27] A summary of the learned JC's decision is this. The SPA was determined automatically as the defendant had failed to pay the full payment of RM1,600,000 being the purchase price according to the SPA on the extended completion date. The plaintiffs were thus entitled to forfeit the entire sum of RM1,552,847.01. The transfer of the property to the defendant was declared null and void. The defendant was ordered to re-transfer the property to the plaintiffs. The plaintiffs was also awarded special damages and general damages to be assessed. *Vide* the alternative claim of the plaintiffs, the SPA, the supplemental agreement and the personal guarantee were all declared to be illegal and invalid.

Our Decision

[28] The reference to the SPA requires clarification. In the pleadings, the plaintiff called it the conditional SPA (Perjanjian Jual Beli Bersyarat). The defendant referred to it as the SPA. There is no dispute that the SPA was conditional as stated in cl. 2A.1 which read:

> 2A.1 The parties herein hereby agree that the sale and purchase herein is conditional upon the following:
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> 2A.2 The Vendor undertake to make or remove the caveat entered by the caveator within one (1) month from the date of this Agreement at the Vendor cost and expenses.
>
> 2A.3 The Vendor undertake to pay or repay to the Purchaser the full Purchase Price within one (1) year ("the Repayment Period") from the date of this Agreement.
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> 2A.4 The Purchaser agrees to let the Vendor occupied or stay on the Property within the Repayment Period subject to the Vendor fully settled all the quit rent, assessment, telephone, electricity, water, indah water, service charge, and other payment in respect of the Property.
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> 2A.5 Both parties agree that if the Vendor have fully repaid the Purchase Price to the Purchaser within or before the Repayment Period, the Purchaser agrees to transfer/sell back the property to the Vendor and the Vendor agrees to pay all cost and expenses in respect of the said transfer/sell including the stamp duty, legal fees and the Real Property Gains Tax (RPGT) on behalf of the Purchaser.
>
> 2A.6 In the event the Vendor fails to pay to the Purchaser the Purchase Price within the Repayment Period, the Purchaser shall have the right to keep or sell the said Property to recover the said Purchase Price, cost, stamp duty, the Purchaser's Solicitors legal fees, Real Property Gains Tax (RPGT), and all other costs and expense in respect of the said Property.

2A.7 If the selling price after the Repayment Period expire is more than the Purchase Price, then the Purchaser agrees to refund any surplus from selling of the said Property to the Vendor (if any) after the deduction of the cost mentioned in the Clause 2A.6 hereinabove.

2A.8 However, if the selling price of the Property is less than the Purchase Price herein stated, the Vendor undertake to pay the shortfall of the said payment equal to the Purchase Price including all cost incurred from the selling of the Property by the Purchase to the third party.

[29] The plaintiffs did not in their pleadings identified what could be any condition other than those found in cls. 2A.2 to 2A.8 above. The "conditional SPA" and the SPA actually refer to one and the same SPA dated 24 November 2015. To avoid any confusion, the expression the SPA will be used in this judgment since it is the expression used in para. 6 of the statement of agreed facts and the learned JC himself had made reference only to the same.

[30] This case turns on the construction of the SPA, the supplemental agreement and the personal guarantee. When construing a contract document, there are several legal principles that have to be considered of which the learned JC seemed to have overlooked.

[31] It is of utmost importance to bear in mind that the sole function of the court in construing a document is with a view to finding the intention of the parties. In *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16), Peh Swee Chin SCJ in delivering the decision of the court said that "The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation".

[32] The approach the court should adopt when asked to determine the true nature of the bargain between contracting parties is an objective approach. The Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464 said at pp. 195 to 196 (CLJ); p. 483 (MLJ) of the report:

> [34] Where the natural meaning of the contract is not clear and in particular absence of words to the effect mentioned above, the principles in ICS in their qualified form (see [28] which qualifies its application *vis-a vis* extrinsic evidence), remain applicable and relevant to the construction of the contract such as to enable the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge … available to the parties".
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> [35] The principles of Lord Hoffmann were summarised in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at [42] 620G. Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

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> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all
B material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. (emphasis added)

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> [36] This objective approach to interpretation is the "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract" (K Lewison, *The Interpretation of Contracts* (5th edn, 2011), Sweet and Maxwell, at 1.03).

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[33] It is elementary that in construing a contract, the whole contract has to be considered with reference to its object and the whole of its terms (see *Chitty On Contracts,* vol. 2012, 31 edn. at p. 943). In *SPM Membrane Switch Sdn Bhd* (*supra*), the Federal Court held that the court must approach the interpretation of a contract holistically, no term is to be taken or interpreted
E in isolation.

[34] The court cannot be rewriting the contract for the parties by imposing a term which could not be imported into the contract or go behind the written terms of the contract to introduce or add new terms to it (see *Shell Malaysia*
F *Trading Sdn Bhd v. Lim Yee Teck & Ors* [1982] 1 LNS 11; [1982] 2 MLJ 181; *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 LNS 194; [1989] 3 MLJ 164; *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571; [2008] 4 MLJ 31; and *Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor* [2014] 5 CLJ 265; [2014] 3 MLJ 892).

G **[35]** In cases where several contracts are contemporaneously executed, the Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 held that the general rule is that reference should be made to all the deeds to ascertain the intention of the parties.

H **[36]** Learned counsel for the plaintiffs' submission that the SPA stands alone as it was entered into on 24 November 2015 while the other two contract documents were made on 25 November 2015, is misconceived. On the facts, the SPA, the supplemental agreement and the personal guarantee were contemporaneously executed. They are obviously connected to each
I other and form a single transaction. Thus all the three contract documents

have to be read as a whole to comprehend their meanings, purport as well as their aim and object (see *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38).

[37] It is trite that the construction of a contract is a question of law for determination by the court and not by the witnesses through their oral evidence (see *NVJ Menon* (*supra*)). We observed that one of the defendant's complaint in this appeal was that the learned JC had premised his findings primarily on the evidence of the third plaintiff. There was truth in this complaint. The learned JC's reliance on the oral evidence of the third plaintiff was rather overwhelming as the excerpts of her testimonies appeared in many parts of His Lordship's judgment (see paras. 9, 10, 11, 13, 14, 15, 16). Inevitably, the assumption is that the third plaintiff's testimonies was given considerable consideration as His Lordship's finding was by and large consistent with the position taken by the third plaintiff in her evidence. The observation by the Court of Appeal in *NVJ Menon* as to the irrelevancy of the oral testimonies of the witnesses and the effect of reliance by a judge upon it for the interpretation of the agreements and circulars, is instructive:

> As Lord Diplock observed in *Bahamas International Trust Co Ltd And Another v. Threadgold* [1974] WRR 1514:
>
> > In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
>
> When it comes to the meaning of words, it does not matter whether they appear in a contract or written law, the result is the same. The point is illustrated by the judgment of Thompson J, (as he then was) in *Reynolds v. Public Prosecutor* [1956] MLJ 101, 103:
>
> …
>
> So too here. It matters not a jot to us what the plaintiff thought his entitlements under the contract with the defendant were. Neither does it matter to us what the defendant's witnesses thought of the way in which that contract ought to be interpreted. Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the financial orders in *Reynolds*.

> In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction. …

[38] We observed that not only his approach to construction of the contract documents was not consistent with established principles, the learned JC also erred in failing to appreciate the surrounding circumstances relating to the making of the SPA and in particular the supplemental agreement and the personal guarantee. His Lordship approached the issues based solely on the SPA. The supplemental agreement and the personal guarantee did not come under his scrutiny.

[39] His Lordship had outlined the background of what eventually lead to the making of the SPA, the supplemental agreement and the personal guarantee but they were confined to the pleaded case of the parties and the testimonies of the witnesses. Proper and adequate analysis of the three contracts documents entered into by the parties that would have shed light into what exactly was the background of and the parties' contractual bargains, was not undertaken. There should have been such an analysis, more so when there was no findings of fact by the learned JC that the SPA, the supplemental agreement and the personal guarantee were entered into by the deceased and the third plaintiff under duress or involuntary.

[40] The SPA, the supplemental agreement and the personal guarantee read together showed that the contracts were entered into because the deceased was in financial distress. He desperately needed a loan from the defendant to settle his debts with the third parties and the bank. This is expressly stated in recitals (d) and (e) of the SPA as reproduced *verbatim* below:

> (d) The Vendor have been desperately need the money to settled the debt owing to the third parties and the Purchaser have agreed to borrowed/ lend/pay the money to the Vendor or on behalf of the Vendor, for the sum equal to the Purchase Price only subject to the condition precedent mentioned in this Agreement.
>
> (e) The Vendor(s) have agreed to sell and the Purchaser(s) has agreed to purchase the said Property at the price and subject to the terms and conditions hereinafter contained.

[41] This is further amplified in recital (a) and (b) of the supplemental agreement as reproduced *verbatim* below:

> a) The Vendor have been desperately need the money to settled the debt owing to the third parties and the Existing Financier and the Purchaser have agreed to borrower/lend/pay the money to or on behalf the Vendor to enable the Vendor to settled the said debt to the third parties and the Existing Financier.

[42] We opined that had the learned JC read the SPA along with the supplemental agreement and the personal guarantee and disregarding the oral views of the witnesses on the interpretation of the SPA, His Lordship would have come to a finding that the SPA was an agreement governing the repayment of the loan to be extended by the defendant and to be secured by the property.

[43] Recital (b) of the supplemental agreement explained it all:

> b) The Purchaser and the Vendor had entered Sale and Purchase Agreement dated 24.11.2015 as agreement to secure the repayment of the loan and the purchase of the Property on terms and conditions therein contained (hereinafter collectively referred to as "the SPA Agreement").

[44] There is no dispute that the loan granted to the deceased was the purchase price for the property

[45] The SPA could have been better drafted. Clause 1 in particular, is not the usual standard clause that one would have come across. In cl. 1.1, the purchase price and the deposit were the same amount, ie, RM1,600,000. There was no percentage specified that constituted the deposit. Clause 3.1 provided that if the balance purchase price is not paid within the stipulated period, the sum paid pursuant to cl. 1 shall be forfeited. But there was no balance purchase price. While in cl. 1.1 the deceased had acknowledged receipt of payment of RM1,600,000, in contrast, cl. 2.2 made provision that the payment of the purchase price was to be paid directly by the defendant to the deceased's third party creditors and the bank, within the period specified in cls. 2.1 and 3 of the SPA.

[46] Granted that the natural meaning of the SPA was not clearly made out in certain provisions, however, if the SPA is taken together with the supplemental agreement and the personal guarantee along with the factual matrix which formed the background to this so called family transaction, one could see that the SPA was a mean by which the defendant ensured that his friendly loan to his brother-in-law would be protected by security in the form of the property. The contractual obligations of the parties were quite clearly spelt out therein.

[47] The defendant's contractual obligations, amongst others and most importantly, was to pay the purchase price within the period stipulated in the SPA. The deceased and the third plaintiff were to ensure the repayment of the purchase price/the loan sum within the repayment period. To secure the repayment of the loan granted to the deceased, if the defendant made the payment of the purchase price within the stipulated period, the defendant could have the property transferred to his name. But as the loan was in the first place, granted to assist the deceased extinguishing his debts to third party

creditors and the bank, the interest of the deceased and the third party over the property was also taken into account. The transfer in the first instance was not intended to be absolute.

[48] The SPA and the supplemental agreement made provisions that if the deceased and the third party were to pay back the purchase price or the loan sum within the repayment period, the defendant was contractually bound to transfer or sell back the property to the deceased. Clauses 2A.1 to 2A.8 of the SPA in our view were incorporated to safeguard the interests of the deceased. The deceased and his family were permitted to continue occupying the property pending the deceased's repayment of the loan at the end of the repayment period. The deceased was only required to pay for the usual utilities and other statutory payments. There was no mention about payment of rentals. Evidently, the deceased and his family had in fact benefitted from such arrangement and this is in contrast to the claim by the plaintiffs that the SPA was more favourable to the defendant as opposed to their interests. The repayment period, for example, was longer than the period the defendant was to effect the purchase price.

[49] In the circumstances, in our view, the key issues to be determined are basically three-fold. First, whether the purchase price was RM1,600,000 or RM1,552,847.01? Second, whether the defendant had paid the full purchase price within the timeline in cl. 2 or 3 of the SPA? Third, whether the deceased and/or the third plaintiff had repaid the loan sum within the repayment period?

RM1,600,000 Or RM1,552,847.01?

[50] On the first issue, the learned JC found at paras. 13 and 14:

> 13. Having considered the Defendant's testimonies and others, though the issue of Purchase Price was strongly opposed by the Plaintiff and be seriously challenged, I hardly find anything be it any evidence, documentary evidence or the lawyer's notes to confirm that the purchase was RM1,552,847-01 and not RM1,600,000.00 …
>
> 14. … it is my considered view that the Purchase Price of the Property is clearly stated in Clause 1.1 of the Agreement being RM1,600,000.00 (RM1.6 million). In pursuant to the documentary evidence adduced and all the witnesses that gave evidence admitted that the Agreed Purchase Price according to the Agreement is RM1.6 million. The Defendant and all his witnesses although admitted that the price stated in the agreement is RM1.6 million allege *vide* their oral evidence that it is the intention of the parties that the purchase price is only an estimated sum but in the absence of any contemporaneous documentary evidence had failed to establish the same either by way of notes by the solicitors in charge of the relevant file, recordings or any minutes of the meeting held between the parties. In view of this, to my mind, it is trite laws that

the documentary evidence outweighs the oral evidence. This is clearly in pursuant to Sections 91, 92, 93 and 94 of the Evidence Act as quoted below: ...

[51] The above paragraphs clearly show that the learned JC had chosen to read cl. 1.1 to the exclusion of cl. 2. He ignored the plain language of cl. 2 which made provision not only of the purchase price but went further to describe how the payment of the purchase price was to be effected by the defendant. The importance of the two clauses merit reproduction:

1. Agreement For Sale And Purchase

1.1 In consideration of the sum of Ringgit Malaysia One Million And Six Hundred Thousand (RM1,600,000.00) Only (hereinafter referred to as "the Purchase Price") now paid by the Purchaser(s) to the Purchaser(s)' Solicitors as stakeholder to be secured by way of deposit and payment towards the purchase price (the receipt of which sum the vendor(s) hereby acknowledge) the Vendor(s) shall sell and the Purchaser(s) shall purchase the said Property free from all charges, caveat, encumbrances and with vacant possession in such state and condition at the time of inspection (fair wear & tear excepted) consisting of furnishing, fixtures, and fittings as specified in Inventory List of The Appendix A (if any) but subject to all conditions of Title whether express or implied and to the existing category of use at an agreed price of Ringgit Malaysia One Million And Six Hundred Thousand (RM1,600,000.00) Only (hereinafter referred to as "the Purchase Price") upon the terms and conditions hereinafter contained.

2. PURCHASE PRICE AND TERMS OF PAYMENT

2.1. Payment of the Purchase Price in respect of the said Property shall be made by the Purchaser to the Purchaser(s)' Solicitors as stakeholder within Ninety (90) days from the date of this Agreement Subject To the Vendor undertake to remove the caveat enter by the caveator within one (1) month from the date of this Agreement failing which the completion date shall be extended free from interest until the said caveat is removed (hereinafter called "the Completion Date") until the removal of the caveat.

2.2 Both parties hereby agrees on the following terms for the payment of the Purchase Price in respect of the said Property shall be made as follows:

2.1 the sum of Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only to M/s Khor & Rafidah;

2.2 the sum of Ringgit Malaysia One Hundred Thousand (RM100,000.00) only to Go Kim Seng;

2.3 the sum of Ringgit Malaysia Seventy Thousand (RM70,000.00) only to Eng Lee Hoon;

2.4 the sum of Ringgit Malaysia Sixty Seventy Thousand Six Hundred Fifty Three And Cent Ninety Three (RM67,653.93) only to Lavenda Building;

A

2.5 the sum of Ringgit Malaysia Fifty Thousand (RM50,000.00) only to Mr. Lee Soon Teck;

2.6 the sum of Ringgit Malaysia Nine Hundred Thousand (RM900,000.00) only to Alliance Islamic Bank Berhad (Company No: 776882-V), the existing financier of the said Property;

B

2.7 the sum of Ringgit Malaysia One Thousand Two Hundred Eighty Seven (RM1,287.00) only to the Purchaser's Solicitors as legal fees and disbursement; and

2.8 any balance of the Purchaser Price shall be used to pay the stamp duty of the transfer of this Property to the Purchaser and the Purchaser's Solicitors legal fees and disbursement.

C

[52] It is pertinent to note despite the acknowledgment of receipt of the purchase price in cl. 1, there was in fact no payment of RM1,600,000 purchase price made to the deceased (see the learned JC's observation at para. 20(b) of the judgment and learned counsel for the plaintiffs' submission

D

at para. 1 at p. 68). This is simply because the payment of the purchase price was to be paid in accordance with the terms stipulated in cl. 2. Clause 2.1 prescribed the period within which the payment of the purchase price was to be paid. Clause 2.2 prescribed that the purchase price was to be applied directly by the defendant towards extinguishing the deceased's various

E

outstanding debts to third parties and the bank.

[53] Clause 2 of the supplemental agreement confirmed that the intended payments were to be made to the third parties. It states:

F

2. The parties hereby agrees on the following conditions for the payment for the Loan in respect of the said Property shall be made to the third party pursuant to the SPA Agreement.

[54] While cl. 1.1 specified that the purchase price was RM1,600,000, the purchase price cum the total loan to be paid to the third parties and the bank as listed out in cl. 2.2 came up to RM1,552,847.01 only. How do we reason this out?

G

[55] If one chooses to read cl. 1.1 independently of cl. 2, as the learned JC had done, the answer would be that the full purchase price was RM1,600,000 and no other amount. But if cls. 1 and 2 are taken together, it would show that RM1,600,000 was not the actual purchase price and what constituted the

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purchase price was the actual amount paid by the defendant pursuant to cls. 2.2 [2.1] to 2.2 [2.8], and in this case, the amount was RM1,552,847.01. We say so for the following reasons.

I

[56] The various payments to the deceased's third party creditors and the bank were set out in cls. 2.2 [2.1] to 2.2 [2.7]. The list of creditors was given by the deceased. It is pertinent to note the learned JC's finding of facts that the deceased and the third plaintiff were informed of the amount of RM1,552,847.01 which was paid through letters dated 18 December 2015, 14 March 2016, 6 May 2016, 27 June 2016, 23 August 2016 and 18 November 2016. This finding was unchallenged and it essentially negated the plaintiffs' contention that the deceased and the third plaintiff were in the dark over the payments that were made.

[57] The payments were all paid off by the defendant by 10 March 2016, within the extended period (the last date being on 23 March 2016) which was six months before the demise of the deceased on 13 September 2016. Evidently, there was no objection registered by the deceased and/or the third plaintiff at the material time that the manner of payment of the purchase price was wrong or they had never agreed to the same. Neither did the deceased nor the third plaintiff ever raised the issue that the amount paid was short of RM1,600,000, ie, less RM47,706.99 and that since the defendant had not paid the difference, the deceased was entitled to invoke cl. 3.1. In law, they are deemed to have accepted that the payment of the entire purchase price was to be paid in accordance with cls. 2.2 [2.1] to 2.2 [2.8] and such manner of payment and the amount so paid, were binding on them.

[58] The reason why the deceased and the third party had agreed to the manner of payments as effected by the defendant is obvious. That is because when the deceased and the defendant executed the SPA, the parties were aware that the figure RM1,600,000 was an estimate of the deceased's outstanding debts to the third party creditors and the bank as the deceased then was unsure of the exact quantum of his debts. DW1 explained that the parties at that point of time when the SPA was signed did not know the full amount and it would only be known when the bank released the redemption statement and if the deceased succeeded in getting discounts from his creditors. So the amount was capped at RM1,600,000. The defendants testified that the amount was capped and estimated at RM1,600,000 for similar reason as the deceased's debts was then already RM1.5 million and payment to the bank was a few months in arrears. The reasons given by the defendant were not without basis. The learned JC himself had made reference to the difference sum in the redemption payment due to the bank, namely between RM900,000 as specified in the SPA and the actual payment of RM905,182.08 as specified in the amended SOD and the evidence adduced during the trial. Most telling that RM1,600,000 was an estimate is recital (C) of the personal guarantee which reads:

A (C) Under the SPA Agreement, the Buyer has agreed to make available to the Borrower **a loan of up to the maximum aggregate principal amount of Ringgit Malaysia One Million Six Hundred Thousand (RM1,600,000.00) (hereinafter referred to as "the Loan")** only and the Borrower agreed, covenanted and undertook to repay and pay all loan sums and all other moneys and liabilities whatsoever owing or payable in
B respect of the loan and under the SPA Agreement and Supplemental Agreement upon the terms and subject to the conditions contained therein. (emphasis added)

Given the circumstances, the third plaintiff cannot be heard to say that the purchase price of RM1,600,000 was not an estimation.

C

[59] As RM1,600,000 was an estimate, we agree with learned counsel for the defendant that the difference between the amount paid of RM1,552,847.01 and the purchase price of RM1,600,000 as specified in cl. 1.1 was explained by the provision of cl. 2.8. We are of the view that cl. 2.2 [2.8] admits of no ambiguity. The creation of cl. 2.2 [2.8] was to cater for the balance of the
D purchase price after the payments specified in cls. 2.2 [2.1] to 2.2 [2.7] had been made, to pay the stamp duty and solicitors legal fees and disbursement. The deceased had agreed to the creation of cl. 2.2 [2.8] and it's binding on the parties.

E **[60]** It follows therefore that it was the true intention of the parties that the payments made pursuant to cls. 2.2 [2.1] to 2.2 [2.8] of the SPA would constitute the full purchase price. It makes no difference if the payments defrayed eventually came up to RM1,600,000 or only RM1,552,847.01, as the case here. It would certainly make a huge difference if there is a provision in the SPA or even in the supplemental agreement and personal guarantee
F stating to the effect that any balance from the payments effected pursuant to cls. 2.2 [2.1] to 2.2 [2.8], if the amount was less than RM1,600,000, had to be paid back to the deceased. But there was none. Again, the plaintiffs are bound by the terms the deceased had agreed with the defendant that under the present circumstances, the purchase price was not the RM1,600,000 but
G RM1,552,847.01. In all these instances, it is the court's duty to preserve the sanctity of the contract freely entered into by the parties (see *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1) and to give effect to the bargain of the parties according to their intention (see *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ
H 357 and *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337). Consequently, nothing turns on the late payment of RM47,706.99. There should not be any admission of liability attached to it.

I

Whether The Defendant Had Paid The Full Purchase Price?

[61] This brings us to the second issue, the compliance by the defendant with regard to the payment of the purchase price. It begins with cl. 2. Failure to comply with the timeline in cl. 2, the defendant is to be granted extension of time under cl. 3. Failure to comply with cl. 3 will end up in the forfeiture of the sum paid pursuant to cl. 1. Clause 3 is reproduced below:

> **3. Extended Completion Date**
>
> 3.1 In the event that the Purchaser(s) are unable to pay the balance price within NINETY (90) DAYS in pursuant to Clause 2, the Vendor(s) shall allow the Purchaser(s) an extension of THIRTY (30) DAYS to pay the same (hereinafter all "the Extended Completion Date") PROVIDED ALWAYS THAT the Purchaser(s) shall pay to the Vendor(s) interest at a rate of Eight per cent (8%) per annum calculated to daily basis on the actual outstanding balance purchase price and if the balance purchase price is not paid within the period stipulated herein, this Agreement shall determine automatically and upon such determination the Vendor(s) shall forfeit the sum paid pursuant to Clause 1 hereinabove and thereafter the Vendor(s) shall be at liberty to sell or otherwise deal with the said Property in such manner as they shall think fit without being accountable to the Purchase(s) for any profit on such sale or dealing. Notwithstanding the period of completion stated therein, it is to be agreed between the parties hereto that any delay by the Vendor(s) in excess of fourteen (14) day in replying correspondence and/or providing necessary documents required for disbursement of the said Loan shall not be taken into account in the computation of the Completion Date and/or the Extended Completion Date (as the case may be), shall be extended to a time equivalent to the excess period of delay until the same is attended to.

[62] We reiterate that the defendant had paid off all the deceased's creditors as listed out in cl. 2.2 [2.1] to 2.2 [2.8], totalling RM1,552,847.01, the first and the last payment being on 24 November 2015 and 10 March 2016 respectively (see para. 8 of the amended SOD). The payments were thus effected within the extended period of 30 days pursuant to cl. 3.1 of the SPA (which ends on 23 March 2016).

[63] As the payments were effected within the timeline stipulated in cl. 2.1 of the SPA, there was therefore no breach of the terms of the SPA by the defendant that could render the agreement automatically determined, and there was nothing to forfeit. The provision of cl. 3 therefore bears no relevance and the invocation thereof by the learned JC was without basis and plainly erroneous. The forfeiture of the entire sum of RM1,552,847.01 was plainly erroneous.

[64] It is trite law that only a true deposit paid to ensure performance of the contract is subject to forfeiture (see *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89; and *Cubic Electronics Sdn Bhd (In*

A *Liquidation) v. MARS Telecommunications Sdn Bhd* [2019] 2 CLJ 723). We reproduce below the following observation of Lord Hailsham J in *Linggi Plantations* (*supra*), on the subject "deposit", "earnest money" and "part-payment" at pp. 93 and 94 of the report:

> … There is in their Lordships' judgment no difference in this context
B between the expression "deposit" and the expression "earnest money". In this context they are two words for the same thing, although in common modern English usage "earnest money" has a slightly archaic ring. As Fry LJ said in *Howe v. Smith* at page 101:
>
> > It (i.e., the deposit) is not merely a part payment, but is then also
> C an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.
>
> It is worth pointing out that the contract in *Howe v. Smith* provided that the sum of £500 there in question was as here paid "as a deposit and in
D part payment of the purchase money" and Cotton L.J. at page 95 in referring to the judgment of James LJ in *Ex parte Barrell* LR 10 Ch 512, said:
>
> > What is the deposit? The deposit, as I understand … is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in
> E accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then … he can have no right to recover the deposit.
>
> F Or, more simply, in the words of Lord MacNaghten in *Soper v. Arnold* (1889) 14 App Cas 429 at page 435:
>
> > Everybody knows what a deposit is, … The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a guarantee
> G that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

[65] On the facts of the present case, we are of the view that on a true
H construction of the SPA, there was no deposit intended to secure the future performance of the SPA, and there was also no a part-payment. We accept learned counsel's argument that in the circumstances of the present case, it was not necessary for such a deposit because the mechanism of the SPA was solely to ensure that the property served as security in the event that the deceased defaulted in repaying the sum loaned out to him.

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[66] Given that all payments were fully effected by 10 March 2016 and the deceased having signed the memorandum of transfer on 25 February 2016, the defendant was permitted to transfer the property to his name pursuant to cl. 6.1, which he did on 13 November 2016, cl. 6.1 reads:

> **6. Execution Of Memorandum Of Transfer**
>
> 6.1 Upon the execution of this Agreement the Vendor(s) shall cause and the Purchaser(s) shall execute a valid and registrable Memorandum of Transfer of the said Property in favour of the Purchaser(s) which shall be held by the Purchaser(s)' Solicitors for submission to the Collector of Stamp Duties for adjudication and proved the balance of purchaser price shall have been paid pursuant to Clause 2 hereto or due payment of the different between balance of purchase price and the said Loan shall, have been deposited with the Purchaser(s)' Solicitors.

[67] Clause 6.1 must be read together with cl. 2A.3 of the SPA and cl. 3 of the supplemental agreement. There can be no dispute that the language in cl. 6 read together with cl. 2A.5 of the SPA and cl. 3 of the supplemental agreement as regards the transfer, were plain and unambiguous. The three provisions enabled the defendant to transfer the property to his name if he satisfied the requirement in cl. 6.1 of the SPA.

[68] It is most unfortunate that the learned JC had proceeded to consider cls. 1.1, 6.1, 2A.6 and 2A.7 but somehow omitted to appreciate the effect of cl. 2A.5 of the SPA (see para. 35 of this judgment) and cl. 3 of the supplemental agreement. Clause 3 of the Supplemental Agreement contain substantially similar provision as in cl. 2A.5. We reproduce it for ease of reference:

> 3. The parties agree that if the Vendor have fully repaid the loan sum or the Purchase Price to the Purchaser within the repayment period, the Purchaser agrees to transfer/sell back the Property to the Vendor and the Vendor agrees to pay all cost and expenses in respect of the said transfer/sell including the stamp duty, legal fees and the Real Property Gains Tax (RPGT).

[69] By failing to read cl. 2A.5 of the SPA and cl. 3 of the supplemental agreement, the learned JC failed to give effect to the words "**the purchaser agrees to transfer/sell back the property to the vendor**" appearing in both provisions. Pursuant to both clauses, following the transfer of the property to his name on 13 November 2016, the defendant was contractually bound, if the third plaintiff (the deceased died on 13 September 2016) have fully repaid the RM1,552,847.01 to him within or before the repayment period, ie, by 23 November 2016, to re-transfer or sell back the property to the plaintiffs. The defendant can only exercise the right to keep or sell the property pursuant to cl. 2A.6 should there be no repayment received by 23 November 2016. The defendant would only be in breach of his

A contractual obligation under the SPA and the supplemental agreement if he had received the payment of RM1,552,847.01 on or before 23 November 2016 and he refused to transfer or sell back the property to the deceased's estate, which is not the case here. Thus, given the circumstances, the transfer cannot be pre-mature, void and unlawful and against the provisions in the B SPA. Conversely, it was validly executed by the defendant in accordance with the provisions of both the SPA and the supplemental agreement as agreed by the deceased and the third plaintiff.

[70] The learned JC fell into error when he opted to rely on the evidence of the third plaintiff to find that the parties had agreed that the transfer could C only be effected upon the expiration of the repayment period if the deceased failed to make the repayment in total disregard of the clear and unambiguous language of cls. 6.1 and 2A.5 of the SPA and cl. 3 of the supplemental agreement. The court should not have been persuaded in this instance to rewrite the SPA to introduce or add new terms to it.

D **Whether The Deceased And/Or The Third Plaintiff Had Repaid The Loan Sum Within The Repayment Period?**

[71] On the third issue, it was not refuted that neither the deceased nor the third plaintiff had settled the said amount within the repayment period or at all. In that event, the SPA entitled the defendant to invoke cl. 2A.6 of the E SPA to keep or sell the property to recover the purchase price and other incidental costs. Clauses 2A.7 and 2A.8 are consequential provisions should a sale takes place.

[72] It is patently clear that the learned JC's decision has resulted in the F plaintiffs being unjustly enriched at the expense of the defendant. It is unjust for the plaintiffs to be allowed to forfeit the entire RM1,552,847.01 and at the same time be permitted to retain the ownership of property. In other words, the plaintiffs did not have to pay back the loan, had their debts to the third parties creditors including the bank paid off and owned the property that was no longer encumbered. The learned JC's decision in no uncertain G terms, had caused gross injustice to the defendant who at the end of the day, was left with no remedy whatsoever. He could not recover the RM1,552,847.01. He had lost the security to recover his money. He was even denied the right to enforce the personal guarantee against the third plaintiff by reason of the alternative claim that the plaintiffs had succeeded H to obtain. In this regard, it is worthy to note that the learned JC had proceeded to make an order on the alternative claim in para. 15 of the SOC notwithstanding that the issue of illegality of the contract documents was not addressed. In any event, on the facts of the case, the plaintiffs had not made out a cause of action on the illegality of the contracts document (see the I Federal Court case of *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9). The alternative order was thus erroneously granted.

Conclusion

[73] For the reasons we had adumbrated, the errors committed by the learned JC warranted our appellate intervention. We set aside the High Court order dated 21 September 2018. The plaintiffs' claim is dismissed with costs. We allow the defendant's counterclaim with costs in term of prayers 34(a), (b) and (c)(i) and (ii) of the amended SOD. We make an order for costs of RM135,000 for here and below. We also make a consequential order that the plaintiffs to refund the High Court costs of RM120,000 and deliver up to the defendant's counsel the Form 14A and any other documents that were held by the plaintiffs' counsel within 14 days.